IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.90 OF 2000

IN

ARBITRATION PETITION NO.89 OF 1999

IN

AWARD NO.32 OF 1998

...

Union of India
through Canteen Stores Department,
Mumbai-400 020 ...Appellant

v/s.

1. Premier Road Carrier
2. Lt.Co.L.S. Bedi
Sole Arbitrator ...Respondents

...

Mr.Girish Kulkarni for the Appellant.

None for the Respondents.

...

**CORAM: D.K.DESHMUKH &**

J.H.BHATIA **JJ.**

**DATED:** 5TH JULY, 2007

**P.C.:**

1. By this Appeal the Appellant challenges the order dated 19th July, 1999 passed by the learned single Judge of this court in Arbitration Petition No.89 of 1999. By that order the learned single Judge has rejected the objections raised by the Appellant to an award made by the learned Arbitrator directing the Appellant to pay certain sums of money to the Respondent and making the award made by the learned Arbitrator rule of the court.

2. It appears that the Appellant and the Respondent had entered into contract for transport of the goods by road. It appears that while the goods were in transit they were robbed. Therefore, the transporter-Respondent No.1 lodged FIR with the police on 18-11-1991 under Section 392 r/w Section 390 of the Indian Penal Code. The price of the goods

which were robbed during the transport was deducted by the Appellant from the other amounts payable to the Respondent which gave rise to a dispute between the parties which was referred to the arbitrator. The claim of the Respondent was that as per the terms of the contract between the parties, it was the liability of the Appellant to take out an Insurance Policy, which was not taken out by the Appellant and therefore the Respondent is not liable for the loss of the goods.

3. The defence of the Appellant was that if the goods are lost because of robbery or theft, the liability was that of the transporter and not of the Appellant. The liability of the Appellant was to take out insurance policy in relation to fire etc. Specific clauses in the contract to that effect were relied on. The learned Arbitrator made an award dated 11-11-1996 directing the Appellant to pay Rs.5,33,519.20 with interest. There was also a direction for payment of freight charges. It is this award which was challenged before the learned single Judge. The learned single Judge decided the Arbitration Petition by order dated 19th July, 1999. The learned single Judge agreed with the finding

recorded by the learned Arbitrator that it was the liability of the Appellant to take out insurance policy, because the insurance policy was not taken out by the Appellant, it can not recover the amount of loss from the Respondent. It is the award and the order of the learned single Judge, which are impugned in this appeal.

4. The learned Counsel appearing for the Appellant pointed out to us that in the reply that was filed before the Arbitrator as also in the petition which was filed before the learned single Judge, clauses (i)(c),(iv), (v) & (vi) of the contract were referred to. Similarly Clause 11 of the contract was also referred to contend that in so far as theft or robbery of the goods is concerned, the Appellant was not under an obligation to take out insurance policy and if goods are lost because of theft or robbery the liability was that of the Respondent. The learned Counsel took us through all the clauses of the contract. None appears for the Respondents.

5. Perusal of the award shows that the learned Arbitrator has relied on clause 1(c)(vi) of the contract. Clause 1(c)(vi) reads as under:-

vi) Insurance cover will be taken by the Government for losses/damages on account of fire, lighting, riots, civil commotions and accidents. However the transporter will be responsible for informing the Department immediately in the event of fire, lighting, riots, civil commotion and accidents by the quickest mode of communication and will furnish immediately necessary photographs, on the spot survey reports, police panchanama and other relevant documents that may be required for settlement of insurance claim lodged by the Government on Insurance Co. for losses arising from the fire, lighting, riots, civil commotion and accidents, failing which the responsibility of such losses will devolve fully on transporters. Amount of loss recovered from the transporter as mentioned in para 1(c), (v) above, will be reimbursed only to the extent of amount of claim paid by the Insurance co. to the Government.

Perusal of clause 1(c)(vi) of the contract quoted above shows that it was the liability of the

Government to take insurance cover in so far as loss of the goods caused because of fire, lighting, riots, civil commotions and accident is concerned. So far as clause 1(c)(v) is concerned, in our opinion, it is relevant. It reads as under:

> v) The transporter will be fully responsible for loss due to theft, pilferage, breakages, damages, leakages, non-delivery, strike and shortage enroute. The transporter shall be responsible for the safe custody of all the property handed over to them by the Government for the purpose of the contract and for all losses thereof or damages thereto from whatsoever happening while in possession of or control of the transporters therein workmen, servants or agents. The cost of stores lost or damages will be recovered from the transporter as per wholesale rates of the Government or more as assessed by the Government which shall be accepted as final and binding on the transporter.

Perusal of the above quoted clause shows that it in

terms lay down that the transporter will be fully responsible for any loss due to theft. It is the case of the transporter himself that he had lodged the FIR with the Police station under Section 392 of the IPC, which is an offence of robbery. Perusal of the provisions of Section 390 of the I.P.C. shows that robbery is an aggravated form of theft. Therefore, if one goes by clause 1(c)(v), then if the goods are lost because of theft or robbery, it will be responsibility of the Respondent. The position appears to have been made further clear by clause 11(2). Clause 11(2) reads as under:-

> 11.2 The transporter shall be responsible for all losses or damages due to any cause, except for fire, lightning, accident and riots/civil commotion (for which the Government will take transit insurance cover), from the time of receipt of the consignment by him and during the period it is held by him till the time it is delivered to the consignee at the specified point. The assessment of losses/damages referred to above shall be determined by the Government and shall be final and binding on the transporter.

Perusal of the above clause makes the position absolutely clear that when the goods are lost or any damages is caused to the goods because of fire, lightening, accident or riots then only the transporter can shift the liability. If the goods are lost or loss is caused for any other reasons than this, then it is the liability of the transporter. Perusal of the order of the learned single Judge shows that the learned single Judge has not applied mind either to clause 11.2 or clause 1(c)(v) of the contract between the parties which in our opinion was absolutely relevant. In so far as the award is concerned, the learned arbitrator has brushed aside clause 11.2 quoted above by observation, that clause 11.2 does not overrule clause 1(c)(vi). There is no question of clause 11.2 overruling clause 1(c)(v). Both clauses are in the same contract. The area covered by clause 1(c)(vi) is different. Really speaking clause 1(c)(v) lays down when the transporter becomes liable. Clause 1(c)(vi) lays down for what purpose insurance policy is to be taken by the Appellant and clause 11.2 gives the over all effect of clause 1(c)(v) and 1(c)(vi). In our opinion, the position is absolutely made clear by

clause 11.2 and in view of that clause and the fact that the FIR was lodged by the Respondent itself for robbery, in no case the award could have been made against the Appellant.

6. In the result, therefore, the Appeal succeeds. The order made by the learned single Judge impugned in the appeal is set aside. Arbitration Petition filed by the Appellant before the learned single Judge is granted in terms of prayer clause (a). No order as to costs.

(D.K.Deshmukh, J.)

(J.H.Bhatia, J.)